No. 16472

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALAN D. MACLEAN and FRANCIS D. MACLEAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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ARGUMENT.

I.

The Government's Brief Assumes That Because the Decedent Purported to Establish a Trust on May 27, 1931 by Modifying the Trust Previously Created by Her on January 12, 1923, She Transferred the Corpus of the Pre-Existing Trust on the Latter Date.

There is no evidence in the record before the Court to support a finding that decedent made a transfer to the trust on May 27, 1931. On the contrary, it is stipulated that the trustee made the transfer [Tr. 15, Stip. V] and the Court found the *corpus* of the trust to have remained the same throughout [Tr. 28, Find. VI]. There is no evidence that he made this transfer solely because his wife so requested. The fact that she concurred in his decision

does not suffice to sustain the Government's contention that she made a transfer subsequent to March 3, 1931.

The case of *Bullard v. Helvering* (1938), 303 U. S. 297 (cited page 11 of the Government's Brief) involved an original 1927 transfer that was void *ab initio* because it was made in violation of the rule against perpetuities. It was no transfer at all since it was void from the beginning. The first valid transfer in the *Bullard* case was admittedly made by the decedent in 1932. In the Maclean trust it has not only been stipulated, but found by the District Court, that Elizabeth Beatrice Maclean made a valid transfer in trust on January 12, 1923. No Court decree has ever held that the Maclean trust was void *ab initio*. Therein lies the distinction between the present case and the *Bullard* case. The present decedent made a valid transfer before March 3, 1931. The decedent in the *Bullard* case made a void and invalid transfer prior to that date. It is submitted that the analogy between these cases, which the Government attempts to draw at page 11 of its Brief, is actually non-existent when the facts of the two cases are clearly understood.

The Board of Tax Appeals in *Webster v. Commissioner*, 38 B.T.A. 273 (cited at page 11 of the Government Brief) is likewise distinguishable. In that case the grantor of the 1929 trust appears to have had the sole power of revocation which she exercised to the extent of 50% of the market value of the securities found in the trust in 1932. She personally withdrew the securities from the 1929 trust and they became her property to do with as she desired. In the Maclean trust no property was withdrawn by the grantor but at all times remained in the hands of the trustee. We maintain that §811(c)(1) of the Internal Revenue Code of 1939 concerns itself with

the *transfer* of trust corpus and the question of whether or not there has been a change of beneficiaries is of no significance.

There is no question about the fact that Elizabeth Beatrice Maclean did concur in the action of John Alexander Maclean in his transfer of the corpus of the trust to the Northern Trust Company, the alternate trustee, on May 27, 1931. It is stipulated that he did make the transfer, as trustee. The District Court found as a fact [Tr. 28, Find. VI] that the trust estate of the trust indenture of May 27, 1931 consisted "of securities transferred from said revoked trust." The grantor of the trust of January 12, 1923, and the trustee thereunder were admittedly in accord about the latter's transfer of the trust corpus. The grantor merely ratified the trustee's act when she directed him to make the transfer to the alternate trustee. There is nothing in the record to show that the grantor compelled the trustee to make this transfer or that she had any power to compel him so to do. The Government's Brief (pp. 13, 14 and 15) deals lightly with the role and powers of trustee, John Alexander Maclean in the transfer of the corpus on May 27, 1931, to the alternate trustee, Northern Trust Company when it says "but this fact must be read in the light of all the instruments likewise stipulated, including the instrument of revocation of the 1923 trust." Among the instruments that must be so read is the trust indenture of January 12, 1923. Under this indenture the trustee was to have as wide a latitude as an absolute owner in the selection and making of investments or conveyance of the trust corpus [Tr. 17].

It is submitted the stipulation of fact that he made the transfer on May 27, 1931 is correct. He simply exercised

one of the powers given him in 1923 when, as his final act as trustee, he conveyed the trust corpus to Northern Trust Company, the alternate trustee, named in the original trust indenture. Then John Alexander Maclean became inactive in the trust. The fact that John Alexander Maclean decided, for reasons sufficient to himself, to exercise the power granted him by the 1923 trust, also coinciding with the desire and instruction of his wife, does not alter the fact that he reinvested the corpus of his trust by conveying it to Northern Trust Company, trustee. He held the power of an absolute owner to transfer that corpus. He simply exercised this power while he was still acting as trustee. Then his wife revoked his trust. The transfer of May 27, 1931, even when read in the light of all the stipulated instruments, was still a transfer by John Alexander Maclean, trustee, and not by this decedent. It should be excluded from her gross estate. His wife merely approved his decision and action in a formal manner when she revoked the trust [Ex. B, Tr. 20].

There is no proof that the husband-trustee made the transfer of May 27, 1931 as a result of his wife's command. At best, the evidence only supports the conclusion that both spouses were, for some reason not shown by the record, agreed that the corpus of the trust should be managed thereafter by the Northern Trust Company, the alternate trustee.

II.

Second Division of the Government's Argument Takes the Position That the Death of Elizabeth Beatrice Maclean's Husband on February 19, 1941 Amounted to Her Making a Transfer in Trust on That Date of the Corpus Here Involved.

In support of this contention the case of *Reinecke v. Northern Trust Company* (1929), 278 U. S. 339 affirming and reversing the District Court of Illinois and C.C.A.—7 is cited (p. 18, Govt. Br). That case involved two sets of trusts. The District Court and the Circuit Court of Appeals had sustained the Commissioner's action in including the corpus of these trusts in the decedent's gross estate. Two of the trusts, No. 1831 and 3048 were created respectively in 1903 and 1910. In these trusts the grantor alone reserved the power of revocation upon the exercise of which the trustee was required to return the corpus of the trust to him. He still had the power of revocation at the date of his death. The corpus of these two trusts was held by the Supreme Court to be includable in the gross estate. Elizabeth Beatrice Maclean, the decedent with whose estate we are here concerned, did not reserve a sole power of revocation and no such power was held by anyone on the date of her death. In that, her trust is distinguishable from trusts No. 1831 and 3048 dealt with in the case of *Reinecke v. Northern Trust Company, supra.*

However, in the case before the Supreme Court here were five other trusts No. 4477, 4478, 4479, 4480 and 4481 which were created in 1919. In those the power was reserved "to alter, change or modify the trust" by the settlor jointly with one or more of the beneficiaries. The settlor died without having modified any of the five trusts

in a material manner. The Supreme Court excluded the corpus of these five trusts from the taxable gross estate. In the course of its opinion the Supreme Court said:

> "* * * since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
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> * * *
>
> "In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c) 'to take effect in possession or enjoyment at or after his death,' include any other than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer, *Gould v. Gould,* 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211; *United States v. Merriam,* 263 U. S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240, 29 A. L. R. 1547."

In the Maclean trust as in the case before the Supreme Court, the decedent required the consent of a beneficiary holding an adverse interest before she could revoke her trust. The Supreme Court's decision in the case of *Reinecke v. Northern Trust Company, supra,* supports the taxpayer's present contention. It does not support the Government's contention (Br. p. 20) that:

> "because of decedent's retention of the power of revocation, the trust corpus would have been included

in her gross estate both before and after *May v. Heiner*. The 1949 Amendment, excluding transfer made prior to March 4, 1931, obviously then did not intend to cover decedent's situation. She could not properly have relied upon the *May v. Heiner* case in view of the earlier case of *Reinecke v. Nothern Trust Companys,* supra. * * *"

It is submitted the case of *Reinecke v. Northern Trust Company, supra,* confirms Elizabeth Beatrice Maclean's action in placing reliance upon *May v. Heiner* since she could not revoke the trust without the consent of her husband, one of the beneficiaries.

The Government's Brief pointed out another of the weaknesses of its own case when it was stated (Br. p. 18):

> "Therefore, a trust such as that at bar, wherein decedent had a right to revoke the trust would have been includable in gross estate both before and after the decision in *May v. Heiner, if at the time of death was still revocable.*" (Emphasis supplied.)

Elizabeth Beatrice Maclean's trust was not revocable at the time of her death. Its corpus should therefore be excluded from her gross estate.

The case of *Chase National Bank v. United States* (Govt. Br. p. 21) involves an estate tax imposed on the proceeds of a life insurance policy under which the decedent retained the sole power of changing the beneficiary. The Supreme Court sustained the tax because the decedent retained this power at the time of his death. In the course of its opinion the Supreme Court said:

> "* * * That, it is true, was said of a succession tax, and we are here concerned with a transfer tax.

> The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke v. Northern Trust Co.,* 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. ..... decided this day. But we think that the rule applied in *Saltonstall v. Saltonstall,* supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferror for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as the donee, and *we think that this termination of such a power at death may also be the appropriate subject of a tax upon transfers."*

It is submitted that Mrs. Maclean never had an exclusive power to revoke her trust and she had no power at all to revoke it when she died. The *Chase National Bank* case supports the taxpayer's contention in the case presently before the Court.

On page 21 of the Government's Brief the case of the *Estate of Sanford v. Commissioner* (1939), 308 U. S. 39 is cited. There the decedent had created a trust of personal property in 1913 reserving to himself the power to terminate the trust in whole or in part or to modify it. He surrendered the power to revoke the trust in 1919 but reserved the power to modify it. After the Gift Tax Act became effective in August, 1924 the decedent renounced

his powers to modify the trust. The Commissioner ruled that the gift to the trust became complete and was taxable only after the power to modify was renounced. The taxpayer contended the transfer took place when the right to revoke was surrendered prior to the effective date of the Gift Tax Act. The Supreme Court rejected the contention that a transfer took place in 1919 when the right to revoke the trust was surrendered. It is submitted that when Elizabeth Beatrice Maclean's hope or possibility of revoking her trust with the consent of her husband perished with his death on February 19, 1941, no transfer took place. No right to modify the trust remained in the hands of Elizabeth Beatrice Maclean after 1941.

It is submitted that the case of the *Estate of Sanford v. Commissioner, supra,* sustains the proposition that the termination of the power to revoke a trust prior to a grantor's death does not amount to a transfer within the meaning and intent of §811(c)(1)(B) of the Internal Revenue Code of 1939. To the same effect as the case of *Sanford v. Commissioner, supra,* is the case of *Rasquin v. Humphreys,* 308 U. S. 54 decided the same day.

In the case of *Burnet v. Guggenheim* (1933), 288 U. S. 280 (cited at Govt. Br. p. 22). Deeds of Trust were made in 1917 and the grantor reserved the power of revocation in himself. This power to alter, modify or revoke was surrendered in 1925. The Supreme Court sustained a gift tax imposed at the time of the surrender on the ground that the transfer occurred when the power to alter, modify or revoke was surrendered. In the *Guggenheim* case, as compared with the case of the *Estate of Sanford, supra,* it is necessary to conclude the Supreme Court sustained the gift tax because of the grantor's act in surrendering his power to modify the trust. At the time the gift was

complete and the tax accrued. It should also be noted that in the *Guggenheim* case the power of revocation reposed in the grantor alone. This distinguished it from the present case. See *Reinecke v. Northern Trust Company, supra.* §811(c)(1)(B) of the Internal Revenue Code of 1939 involved in the present case was, of course, not under consideration in the *Guggenheim* case.

It is submitted that since we are here concerned with a statute imposing a tax whose meaning is doubtful, the doubt should be resolved in favor of the taxpayer and against the Government. *Gould v. Gould,* 245 U. S. 151, 38 S. Ct. 53, 3 A. F. T. R. 2958 (1917) affirming S. Ct. N. Y. (168 App. Div. 900, 152 N. Y. Supp. 1144).

Conclusion.

For the reasons announced in the appellant's opening brief and those contained herein, it is respectfully submitted that the District Court's Judgment of March 3, 1959 should be reversed with instructions that Judgment be entered for the Appellants.

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